Supreme Court, U.S.
FILED
99 238 JUL 12 1999
OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL EIBLE,
Petitioner

versus

FEATHER O. HOUSTOUN, SECRETARY, Department of Public Welfare; MICHAEL J. BRESLIN, Executive Deputy Secretary; DAVID W. JAY, Superintendent, Allentown State Hospital; STEPHEN L. PETERS; MICHAEL J. KLORAN; NATE J. CARBELLO; L.J. KNAAKE; ALLENTOWN STATE HOPSITAL; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Richard J. Orloski,
Attorney for Petitioner
ORLOSKI, HINGA & PANDALEON
111 North Cedar Crest Blvd.
Allentown, PA 18104
(610) 433-2363

4612P

QUESTION PRESENTED FOR REVIEW

I. WHETHER OR NOT THE COURT OF APPEALS FOR THE THIRD CIRCUIT ERRED AS A MATTER OF LAW BY ENTERING A DECISION IN CONFLICT WITH RELEVANT DECISIONS OF THIS HONORABLE COURT ON THE SAME IMPORTANT MATTER BY CONCLUDING THAT STATE ACTOR/EMPLOYER MAY ILLEGALLY (I.E. ACCORDING TO A STATE COURT DECISION IN A RELATED MATTER) "RESIGN" A PUBLIC EMPLOYEE'S EMPLOYMENT WITHOUT PROVIDING ANY NOTICE OR OPPORTUNITY TO BE HEARD?

TABLE OF CONTENTS

	PAGE
Question Presented for Review.....	i
Table of Citations.....	iv
Opinion Below.....	1
Jurisdiction.....	2
Federal Provisions Involved	3
Concise Statement of the Case.....	4
Reasons Relied Upon For Allowance of the Writ....	8
Conclusion	12

Appendix

Order of U.S. Ct. of Appeals for the Third Circuit, per Rossenn, CJ. Dated April 13, 1999 .....

Order of U.S. District Court for Eastern District of Pennsylvania per Robert S. Gawthrop, III, S.J. dated July 24, 1998 .....

PAGE

Order of U.S. District Court for the Eastern District of Pennsylvania per Robert S. Gawthrop, III, S.J. dated April 21, 1998 .....

Order of Commonwealth Court of Pennsylvania per Lord, S.J. dated May 17, 1996 .....

Fourteenth Amendment to the United States Constitution, 42 U.S.C. §1983 United States Constitution, Amendment 14 .....

Pertinent portion of record below .....

TABLE OF CITATIONS

	PAGE
Board of Regents v. Roth, 408 U.S. 564, 576-578 (1972)	8
City of West Covina v. Perkins, _____ U.S. _____, _____, 119 S.Ct. 678, 682 (1999)	10, 11
Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538 (1985)	8, 9
Ginolek v. Philadelphia, 630 F Supp. 827 (E.D. Pa. 1986)	9
Kyle v. DER, 477 A.2d, 897, Pa. Cmwlth. (1984)	8
Matthews v. Eldridge, 42 U.S., 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)	8
Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11-12 (1978)	8
Parratt v. Taylor, 451 U.S. 527, 540 (1981) overruled on other grounds, 474 U.S. 327 (1986)	9
Zinermon v. Busch, 491 U.S. 113, 1089 L.Ed.2d 100 (1990)	8, 9

OPINIONS AND ORDERS BELOW

The order of the United States Court of Appeals for the Third Circuit rendered April 13, 1999 is unrecorded and appears at page 1a of the Appendix herein.

The Order of the United States District Court for the Eastern District of Pennsylvania rendered July 24, 1998 is unrecorded and appears at page 24a of the Appendix herein.

The Order of the United States District Court for the Eastern District of Pennsylvania rendered April 21, 1998 is unrecorded and appears at page 12a of the Appendix herein.

JURISDICTION

The final order of the Court of Appeals is dated April 13, 1999 and this Petition for Writ of Certiorari is filed timely within ninety (90) days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C. §1254(1) and Rule 10 (c) of this Honorable Court.

FEDERAL PROVISIONS INVOLVED

U.S.C.A., Amendment 14 at Appendix page _____.

42 U.S.C. §1983 at Appendix page _____.

CONCISE STATEMENT OF THE CASE

In April, 1989 Respondent, Department of Public Welfare ("DPW") hired Petitioner Michael A. Eible to work as a cook, a civil service position, at Respondent Allentown State Hospital ("ASH").

On March 11, 1995, Respondents Peters, Carabello, and Kloran involuntarily terminated Petitioner, and called this termination an "involuntary resignation." This termination was made without Plaintiff's signature in clear contravention of Pennsylvania's Civil Service rules. Although Plaintiff had a statutory right to appeal the illegal "involuntary resignation" which served as his termination, he was never given notice of his right to that appeal, despite the fact that terminated Civil Service employees are routinely given a form which notifies them of the right to appeal.

Mr. Eible brought against Respondents in Federal Court under the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA"), and 42 U.S.C. §1983 under the Due Process clause, and the First Amendment. The basis for jurisdiction in the district court were 28 U.S.C. §1331 and §1343. The District Court granted and the Court of Appeals affirmed the order granting Respondent's motion for summary judgment on all counts. Mr. Eible now respectfully seeks review by this Honorable Court limited to his procedural due process claims.

During the course of Mr. Eible's civil service employment, both parties agreed that he suffered from some physically disabling and work-related injuries. From about December, 1994 throughout May, 1995 the parties attempted to resolve their disputes relative to Mr. Eible's medical condition and reasonable accommodation thereof. Eg. 30 a, 32a, 33a, 124a, 152a, 269a, 278a, 285a, 292a, 293a Appendix page numbers _____. In the course of negotiations to resolve their disputes Respondents

offered Mr. Eible a lower-paying, more physically demanding non-civil service position. 32a, 33a, 269a Appendix page numbers _____. Mr. Eible was not interested in such a position.

On March 11, 1995, Mr. Eible received an additional settlement offer for the alternative, undesirable job and an unsigned "voluntary termination" notice from his current position. Reproduced Record at 57a. Mr. Eible's attorney and union representative reasonably advised him that he could ignore the separation notice because a Civil Service employee cannot resigned without a signature. R.R. at 35a Appendix page number _____; 71 P.S. §741.806, 4 Pa. Code §101.51. No dispute exists that Respondents failed to send a form with the "voluntary termination" form that notified Mr. Eible of his right to appeal to the Civil Service Commission the bogus "voluntary termination." Respondents normally provided such notice as a matter of course for Civil Service employees such as Mr. Eible who are subject to adverse employment actions:

> Q. So there are certain things, certain adverse employment actions that the employee is told about the option of going to review that matter before the Civil Service Board; is that correct?
>
> A. Yes.
>
> Q. Now is that done verbally or is it done in writing?
>
> A. In writing.
>
> Q. and is that a form you prepare or is that prepared by the staff at the DPW?

A. If we issue a letter, a discipline letter, for example, we tell them in the body of the letter the right to appeal to the commission and/or the union contract if they're covered, then we will attach a copy of the appeal form.

* * *

Q. In [Plaintiff's] resignation letter did you tell him if he disagreed with the resignation letter he had the right to appeal that to the civil service board?

A. No.

Q. But there are adverse employment action that in fact trigger that procedure, correct?

A. Yes.

Q. Why in this case, in the case of Michael Eible, was no such notice given to him and no such form to facilitate an appeal to the civil service board given to him?

A. It was an acceptance of resignation. We don't provide those types of notices on resignation actions.

R.R. at 288a Appendix page number _____. The record thus is clear Respondent failed to provide Mr. Eible with notice of his right to appeal his unsigned, unconsented-to "voluntary termination."

On April 11, 1995, Michael Eible received notice from the DPW suggesting that Respondents' aforesaid actions actually did have the effect of involuntarily resigning him, despite the fact that he never signed the form. Appendix

page _____. Mr. Eible contacted the Civil Service Commission which informed him of his right to appeal any adverse employment action. R.R. at 35a Appendix page number _____.

Within twenty (20) days of learning that Respondents treating Mr. Eible as having resigned, he requested a hearing before the Civil Service Commission. The Civil Service Commission denied Mr. Eible's request for a hearing. R.R. at 36a, 63a Appendix pages _____. Upon appeal the Pennsylvania Commonwealth Court, held that the resignation was illegal. R.R. at 69-70a Appendix pages _____. Mr. Eible's federal procedural due process claim was NOT before Pennsylvania's Commonwealth Court upon these facts, Mr. Eible respectfully seeks review by this Honorable Court.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The right to Fourteenth Amendment Due Process is protectable under 42 U.S.C. §1983. To establish a violation of procedural due process and succeeded on his claim, Plaintiff must show evidence that (1) state actors (2) deprived him of a constitutionally protected right without the benefit of constitutionally required procedures. Matthew's v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

2. The "procedural component" of the due Process Clause protects against government effected deprivations of constitutionally protected "life, liberty or property" interests without constitutionally adequate process. Zinermon v. Busch, 491 U.S. 113, 108 L.Ed.2d 100 (1990). Michael Eible claims that Defendants deprived him of his civil service position to which he was legally entitled. Therefore, his claim depends on his having a constitutionally protected "property" interest in the position. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 538 (1985); Board of Regents v. Roth, 408 U.S. 564, 576-578 (1972). If Mr. Eible demonstrates a constitutionally protected property interest in his employment position, defendant may not deprive him of the right without "constitutionally adequate" process. Zinermon, 470 U.S. at 117, 108 L.Ed.2d at 114 (1990); Loudermill, 470 U.S. at 538; Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11-12 (1978).

State law creates and defines constitutionally protected property rights. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Loudermill, 470 U.S. at 538; Craft, 436 U.S. at 9. Pennsylvania law recognizes a vested property interest in civil service employment positions such as Mr. Eible's. Kyle v. DER, 477 A.2d 897, Pa. Cmwlth. (1984). Therefore, Mr. Eible's employment position constitutes "property" protected by the

Due Process Clause. See Loudermill, 470 U.S. at 538-39. It is clear that defendants' involuntary termination of Mr. Eible's employment deprived him of his property right.

This Honorable Court has generally held that our Constitution requires some kind of notice or hearing prior to deprivation of property. Zinermon, 404 U.S. at 128, 108 L.Ed.2d at 115 (citations omitted). As a public employee with a property interest in his continued employment, predeprivation process is required. Loudermill, 470 U.S. 538-39; Gniolek v. Philadelphia, 630 F Supp. 827 (E.D. Pa. 1986). Notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner. Parratt v. Taylor, 451 U.S. 527, 540 (1981) overruled on other grounds, 474 U.S. 327 (1986).

3. Defendants' termination of Mr. Eible without any notice or opportunity to be heard contravene his constitutional due process right. If defendants were "terminating" Eible, they admitted that the would have provided him with notice of his right to appeal at such adverse employment hearing. Appendix at _____/R.R. at 288a). Instead, because defendants had no basis to terminate Mr. Eible lawfully, they attempted to "voluntarily resign" him against his will. Obviously if Mr. Eible truly had voluntarily resigned, no notice or opportunity to be heard would be required because no adverse employment action would have existed. No dispute exists, defendants failed to provide Mr. Eible with any notice or opportunity to be heard. The Court of Appeals erroneously concluded that defendants were not required to provide Mr. Eible with notice of his right to appeal because such notice was contained in a state statute.

Defendants have taken the insupportable position that their illegal resignation of Mr. Eible activated the running of time decision which Mr. Eible was required to request a hearing. Importantly defendants could not lawfully turn an unsigned "voluntary termination" form into a legal

resignation, 71 P.S. §741, 806, 4 Pa. Code §101.51[1]. Mr. Eible, therefore, took the reasonable and rightful position that he had not suffered an adverse employment action at that time. On April 11, 1995, defendants sent Mr. Eible a notice indicating that defendants were treating him as if he had voluntarily resigned. Although Michael Eible knew he did not resign, the April 11, 1995 notice advised him for the last time that defendants were treating him as having resigned. Mr. Eible promptly filed a request for hearing within twenty (20) days of such notice as required by Pennsylvania law.

A. The court of appeals failed to acknowledge that the employer attempted to illegally "resign" Mr. Eible from his employment position. Under Pennsylvania law, a employer may not lawfully "resign" an employee unless the employee signs the resignation form and intends to resign. 71 P.S. §741.806, 4 Pa Code §101.51. See also Eible v. State Civil Service Commission, Pa. Cmwlth _____ (1996) at Appendix page _____. No dispute exists that Mr. Eible neither signed a resignation form nor intended to resign. As Pennsylvania's Commonwealth Court has held, therefore, defendants attempted illegally to involuntarily resign Mr. Eible. Id.

When a Pennsylvania civil service employee suffers an adverse employment action, defendants normally provide the employee with written notice of his right to appeal such action. R.R. at 288a Appendix page number _____. Defendants admitted that they failed to provide Mr. Eible with any notice of his right to appeal. Id.

The court of appeals improperly relied upon a case which is legally and factually differed from the case at bar.

In affirming summary judgment, the court of appeals erroneously relied upon City of West Covina v. Perkins ____

[1] "No resignation shall be made or shall be valid unless it bears the signature of the person signing..." 71 P.S. §741.806.

U.S. _____, _____, 119 S.Ct. 678, 682 (1999). Opinion of Third Circuit dated April 13, 1999 at pages 10 Appendix page _____. Perkins inter alia, involved a family's suit against a city alleging due process violations in connection with the search of their residence during a criminal investigation. This Honorable Court held that when police seize property for a criminal investigation, the Due Process Clause does not require them to provide the individual owner with notice of state law remedies for the property's return.

In Perkins, the police notified the homeowners that the police searched the premises on a specified date and seized listed property. The notice contained a contact for further information. The Plaintiff sought expansive notification including options of available remedies. This Honorable Court refused to further expand notification requirements of remedies and procedures date and seized listed property. The notice contained a contact for further information. The Plaintiff sought expansive notification including options of available remedies. This Honorable Court refused to further expand notification requirements of remedies and procedures during criminal investigations, in part, because state statutes contained the expanded information.

The case at bar does not involve a criminal investigation. More importantly, the plaintiff here is not seeking expanded notification of remedies or procedures. Rather, Mr. Eible received no notice or opportunity to be heard whatsoever. The court of appeals misapplied Perkins to this case instead of properly relevant decisions of this Honorable Court.

In sum, the Due Process Claus requires meaningful notice and opportunity to be heard. Defendant wholly failed to provide notice or a hearing to this civil service employee. The court of appeals randomly relied upon a criminal case

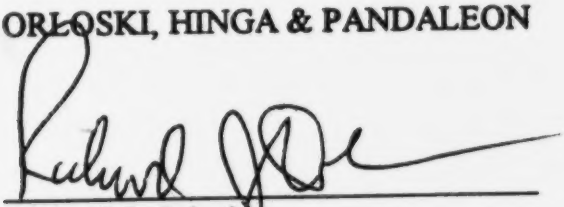
involving expensive notification requirements to uphold summary judgment on Mr. Eibles Due Process Claim. Hence Michael Eible respectfully seeks review by this Honorable Court.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari ought to be granted.

Respectfully submitted,

ORLOSKI, HINGA & PANDALEON



Richard J. Orloski,
Attorney for Petitioner
Attorney ID No. 09857
111 N. Cedar Crest Blvd.
Allentown, PA 18104
610-433-2363

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL EIBLE,
Petitioner

versus

FEATHER O. HOUSTOUN, SECRETARY, Department of Public Welfare; MICHAEL J. BRESLIN, Executive Deputy Secretary; DAVID W. JAY, Superintendent, Allentown State Hospital; STEPHEN L. PETERS; MICHAEL J. KLORAN; NATE J. CARBELLO; L.J. KNAAKE; ALLENTOWN STATE HOPSITAL; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE,
Respondents

APPENDIX OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Richard J. Orloski,
Attorney for Petitioner
ORLOSKI, HINGA &
PANDALEON
111 North Cedar Crest Blvd.
Allentown, PA 18104
(610) 433-2363

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-1736

MICHAEL EIBLE,
Appellant

v.

FEATHER O. HOUSTOUN, SECRETARY, Department of Public Welfare; MICHAEL J. BRESLIN, Executive Deputy Secretary; DAVID W. JAY, Superintendent, Allentown State Hospital; STEPHEN L. PETERS; MICHAEL J. KLORAN; NATE J. CARBELLO; L.J. KNAAKE; ALLENTOWN STATE HOPSITAL; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE,

---

Appeal from the United States District Court
For the Eastern District of Pennsylvania
D.C. No.: 96-cv-04655
District Judge: Honorable Robert S. Gawthrop, III

Submitted Under Third Circuit LAR 34.1(a) March 26, 1999

Before: GREENBERG, ROTH, and ROSENN, Circuit Judges.

12

(filed April 14, 1999)

JUDGMENT

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a).

After consideration of all contentions raised by the appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed. Costs will be taxed against the appellant.

/S/ Chief Deputy Clerk

Dated: April 13, 1999

UNREPORTED - NOT PRECEDENTIAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 98-1736

MICHAEL EIBLE,
Appellant

v.

FEATHER O. HOUSTOUN, SECRETARY, Department of Public Welfare; MICHAEL J. BRESLIN, Executive Deputy Secretary; DAVID W. JAY, Superintendent, Allentown State Hospital; STEPHEN L. PETERS; MICHAEL J. KLORAN; NATE J. CARBELLO; L.J. KNAAKE; ALLENTOWN STATE HOPSITAL; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE,

---

Appeal from the United States District Court
For the eastern District of Pennsylvania
D.C. No.: 96-cv-04655
District Judge: Honorable Robert S. Gawthrop, III

Submitted Under Third Circuit LAR 34.1(a) March 26, 1999

Before: GREENBERG, ROTH, and ROSENN, Circuit Judges.

(Files April 13, 1999)

MEMORANDUM OPINION

ROSSENN, Circuit Judge.

In April, 1989, defendant Department of Public Welfare ("DPW") hired plaintiff Michael Eible to work as a cook, a civil service position, at defendant Allentown State Hospital ("ASH"). Eible had informed ASH at the time of hiring that a right shoulder injury, which he suffered at a prior job, rendered him permanently and partially disabled.

Eible's work attendance at the hospital was poor, and he had difficulty getting along with his co-workers. He also suffered recurring injuries while at work. On April 11, 1992, Eible tore a tendon in his right biceps. He returned to work with light duties, which included cleaning and food preparation but no heavy lifting, on May 4, 1992. Eible twice reinjured his biceps in July; however, he resumed working with full duties on August 3, 1992. On August 23, 1993, ASH warned Eible that he was abusing sick leave. Two months later, he was given a negative performance evaluation. On November 22, 1993, Eible once again reinjured his right arm. After this injury, Doctor Marvin Kallish treated Eible and determined that Eible should not repetitively lift more than twenty pounds.

Over the ensuing four weeks, Eible worked for a total of only one and one-half days. Eible resumed working on December 20, 1993, but the next day he slipped on the floor

and injured himself. After a two-week absence, Eible returned to light duty work on January 3 or 4, 1994. Two weeks later, Eible's supervisors, defendants, Stephen L. Peters, Michael J. Kloran, and Nate J. Carabello, informed Eible that he should not return to his position as cook until he could work at full duty.

Through March 8, 1994, Eible exhausted his paid sick leave and holiday leave. From March 9, 1994, to September 8, 1994, ASH allowed Eible to commence unpaid sick leave with benefits. From September 9, 1994, to March 8, 1995, Eible continued on unpaid sick leave but without benefits.

While he was on unpaid sick leave and not permitted to return to his position as a cook, Eible wrote several letters to DPW officials in Harrisburg. In the letters, Eible complained of ASH's unwillingness to allow him to work as a cook on light duty.

On June 6, 1994, Eible filed a complaint the Pennsylvania Human Relations Commission ("PHRC"). In the complaint, Eible alleged that the defendants discriminated against him by refusing to permit him to perform light-duty work as a cook. At a PHRC factfinding conference held on December 9, 1994, ASH offered Eible a job as a food service worker, a non-civil service position with more flexibility than the cooking job and in which heavy lifting was easier to avoid; pay, however, was slightly lower than in Eible's previous position as a cook. Eible rejected the offer. On February 17, 1995, Carabello sent a letter to Eible offering the food service worker position. Carabello called this offer a reasonable accommodation for Eible's twenty-pound lifting restriction and added: "This will dispose of all issues surrounding your current complaint with the [PHRC]." Eible declined the offer.

The applicable union contract provision and DPW policy restricted the length of unpaid sick leave to one year. Failure to return following the termination of the leave is

deemed a resignation. ASH sent Eible two letters, dated February 3, 1995, and February 13, 1995, informing him of this one-year time limitation. Eible has admitted receiving the letters, which also advised Eible that his failure to return to work by March 8, 1995, would be deemed a resignation effective March 9, 1995. The February 13 letter also instructed Eible to notify ASH immediately if he could not return to work as scheduled. Eible failed to return to work or respond to the letters. On March 9, 1995, Peters called Eible and again apprised Eible that he must return to work or have his resignation accepted. Eible told Peters that he would not return to work.

On March 10, 1995, defendant David W. Jay, Superintendent of ASH, wrote Eible that ASH accepted his resignation. The letter did not inform Eible of his right to appeal the termination of employment to the Civil Service Commission. Relying on the advise of counsel, Eible ignored the letter.

On April 29, 1995, Eible appealed the termination to the Civil Service Commission, which dismissed the appeal as untimely. The Pennsylvania Commonwealth Court affirmed the dismissal.

In June 1995, Eible's counsel prepared an age-discrimination charge. Eible, who is fifty-two years old, and his counsel's staff affirmed that the charge was mailed to the Equal Employment Opportunity Commission ("EEOC") on or about June 8, 1995. However, Eible presents no proof that the EEOC ever filed the charge filed at No. 17F942947 contained no age-discrimination allegations. There is no evidence that Eible had filed any other EEOC charges.

On June 27, 1996, Eible filed a complaint with the United States District Court for the Eastern District of

Pennsylvania.[1] In the complaint, Eible alleged disability discrimination, age discrimination, retaliatory discharge, and a violation of his procedural due process rights.

On April 21, 1998, the District Court granted the defendants' motion for summary judgment. First, the Court concluded that Eible was not a "qualified individual" under the Americans with Disabilities Act ("ADA") and failed to present evidence that disability discrimination, rather than excessive sick leave, was the reason for his termination. Second, the Court dismissed the age-discrimination claim because Eible could not prove that he had timely filed his age-discrimination charge with the EEOC and the statute of limitations for filing such charge had run. Third, the Court held that the defendants did not unlawfully retaliate against Eible for the letters written to the defendants advising them of his disability and ASH's unwillingness to allow him to work as a cook on light duty because the letters pertained to matters of personal interest and not public concern. Fourth, the Court determined that the defendants' failure to give Eible notice of his right to appeal the termination of employment to the Civil Service Commission did not violate Eible's due process rights. In an order dated July 24, 1998, the Court denied Eible's motion for reconsideration.

Eible timely appealed.[2] We affirm.

I.

We have plenary review over the District Court's grant of summary judgment. Estate of Zimmerman v. Southeast Pa. Transp. Auth., _____ F.3d _____, _____ (slip op. at 4) (3d Cir. 1999). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for

---

[1] The District Court had subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

[2] We have appellate jurisdiction pursuant to 28 U.S.C. §1291.

a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 2149-50 (1986) (citations omitted).

The defendants were entitled to summary judgment on Eible's ADA claim. Under the burden-shifting framework of disability-discrimination claims, Eible was obliged to present evidence that the defendants' articulated reason for the termination was pretextual. See Olson v. General Elec. Astrospace, 101 F.3d 947, 951 (3d Cir. 1996). The defendants produced considerable evidence that Eible's employment was terminated for taking excessive sick leave, which is a legitimate, nondiscrminatory reason. Assuming arguendo that Eible made a prima facie case of disability discrimination, to survive summary judgment Eible needed to present sufficient "evidence, direct or circumstantial, from which a factfinder could reasonably either (1) disbelieve the employer's articulated legitimate reasons; or (2) believe that an invidious discriminatory reason was more likely than not a motivating factor or determinative cause of the employer's action.'" Id. (quoting Fuentes v. Perskie, 32 F.3d 759, 764 (3d Cir. 1994)).

Eible failed to present evidence that his excessive leave was a pretext for the defendants deeming him to have resigned. In addition, Eible submitted no evidence that the defendants applied the sick leave time limit in a discriminatory manner. The defendants' alleged noncompliance with civil service regulations does not suggest that the defendants discriminated against Eible on the basis of his disability. Although Eible was told that he could no longer work as a cook on light duty, he had the opportunity to return to work for ASH as a food service worker.[3]

---

[3] Federal Rule of Evidence 408 does not render inadmissible the offer of employment as a food service worker. Although the letter noted that the accommodation rendered moot Eible's PHRC complaint, the job offer

Undisputed evidence demonstrates that the defendants' enforcement of the one-year sick leave limit was not a ruse designed to rid themselves of Eible. ASH sent Eible two letters informing him of the time limit and his obligation to return to work in order to avoid having his absence deemed a resignation. Despite the February 13, 1995 letter's instruction for Eible to inform ASH if he could not return to work, Eible did not contact ASH to apprise it of his intention not to work. Nevertheless, Peters called Eible on March 9, 1995, the day after Eible exhausted his sick leave, so he could tell Eible personally that ASH would accept his resignation if Eible did not report for work. During that conversation, Eible for the first time informed ASH that he would not return to work. Moreover, ASH offered Eible employment as a food service worker. Therefore, there was no genuine issue of material fact regarding whether the defendants' legitimate, nondiscriminatory reason for the termination of Eible's employment was pretextual. Accordingly, the District Court did not err in granting summary judgment for the defendants on the ADA claim.

The defendants were also entitled to summary judgment on Eible's age-discrimination claim. As a precondition to filing a suit under the Age Discrimination in Employment Act ("ADEA"), the plaintiff must file a charge with the EEOC. 29 U.S.C. §626(d). Failure to file a charge with the EEOC precludes a plaintiff from obtaining relief under the ADEA. Bihler v. Singer Co., 710 F.2d 96, 97 (3d Cir. 1983). Eible did not produce sufficient proof that he filed the age-discrimination charge with the EEOC that his

---

was unconditional; Eible was not required to dismiss his PHRC complaint. Because it was not conditioned upon Eible's agreement to dismiss the complaint, the job offer contained in the letter was not a settlement offer. See Lightfoot v. Union Carbide Corp., 110 F.3d 898, 909 (2d Cir. 1997) (holding unconditional offer of job reinstatement cannot be considered settlement offer inadmissible under Rule 408).

counsel's office had purportedly sent. Because it appears that the EEOC never received Eible's age-discrimination charge, Eible is precluded from proceeding on his ADEA claim. Moreover, Eible failed to present a scintilla of evidence that age discrimination, rather than excessive sick leave, caused his employment to be terminated. Thus, the District Court's grant of summary judgment for the defendants on the ADEA claim was not erroneous.

In addition, the defendants did not violate Eible's First Amendment rights. The First Amendment is not implicated when "a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest." Connick v. Myers, 461 U.S. 138, 147 (1983). There is no evidence in the record that Eible's letters pertained to matters of public concern. Indeed, Eible concedes that his letters, which are not contained in the record, complained of the defendants' refusal to permit him to work as a cook on light duty. Though "a matter of concern to an individual employee may intersect, at times, with a matter of widespread public interest, a public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run." Holbrook v. City of Alpharetta, 112 F.3d 1522, 1530 (11th Cir. 1997) (internal quotations omitted). Hence, we perceive no error in the District Court's grant of summary judgment for the defendants on the retaliation claim.

Lastly, Eible had no due process right to notice of his right to appeal the termination of his employment to the Civil Service Commission. Although Jay's letter informing Eible that ASH had accepted his resignation made no mention of Eible's right to appeal, Eible's appellate rights were a matter of public notice and available. Pa.Stat. Ann.tit. 71, §941.951 (West 1990), details a public employee's right to appeal a separation from employment within twenty days of receiving

notice of the separation. Because a Pennsylvania statute made public and available Eible's administrative appellate rights, the due process clause did not oblige the defendants to give Eible a separate notice of his appellate rights. See City of West Covina v. Perkins, _____ U.S. _____, _____, 119 S.Ct. 678, 682 (1999) (holding notice not required of state-law remedies published in state statutes). Therefore, the District Court did not erroneously grant summary judgment for the defendants on Eible's due process claim.

II.

We will affirm the judgment of the District Court. Costs will be taxed against the appellant.

_____

TO THE CLERK:

Please file the foregoing opinion.

/S/_____
Circuit Judge

11a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL EIBLE, Plaintiff	:	Civil Action
v.	:	No. 96-4655
FEATHER O. HOUSTON, et al., Defendants	:	

ORDER

AND NOW, this 21st day of April, 1998,

DEFENDANT'S Motion for Summary Judgment is

GRANTED.

BY THE COURT:

Robert S. Gawthrop, III

12a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRIC OF PENNSYLVANIA

MICHAEL EIBLE, Plaintiffs	:	Civil Action
v.	:	No. 96-4655
FEATHER O. HOUSTON, et al., Defendants.	:	

MEMORANDUM

Before the court is defendants' motion for summary judgment on plaintiff's claims of (1) employment discrimination under the Americans with Disabilities Act (ADA), see 42 U.S.C. §12101 et seq. (2) employment discrimination under the Age Discrimination in Employment Act (ADEA), see 29 U.S.C. §§ 621-634, and (3) violation of his Fourteenth and First Amendment rights, under 42 U.S.C. § 1983. Upon the following reasoning, I conclude that plaintiff has not put forth sufficient evidence to defeat defendants' motion for summary judgment. Accordingly, I grant summary judgment in favor of defendants.

Background

The facts, set forth in the light most favorable to plaintiff, reveal the following. See Anderson v. Liberty Lobby, 477 U.S. 242, 247 (1986). Defendant Pennsylvania Department of Public Welfare ("DPW") hired Plaintiff Michael Eible to work as a cook at its subdivision, Allentown State Hospital ("ASH"), in April, 1989. At that time, Eible

told ASH that he was "17 ½ percent disabled of my whole body right shoulder" due to a prior work injury. On April 11, 1992, Eible tore his right biceps tendon while at work. He received workers' compensation and returned to work with "light duties" on May 4, 1992. During July of that year, Eible suffered two additional recurrences of his April 1992 injury. On August 3, 1992, he returned to work with full duties.

On August 23, 1993, Eible received an oral warning for sick-leave abuse. In October 27, 1993, he received a negative performance evaluation. On November 22, 1993, he had a recurrence of his arm injury. Eible was treated by Dr. Kallish, who was chosen by defendants; Dr. Kallish restricted Eible to lifting no more than twenty pounds.

Between November 23 and December 19, 1993, Eible worked only one and a half days. He returned to work on December 20, 1993. The next day he reinjured himself by slipping on the floor at work. He returned to work on January 4, 1994 with light duties. In January, 1994, Eible's workers' compensation claims for his winter 1993 injuries were denied. On January 17 or 18, plaintiff was told that he must work at full duty; he thereafter used a combination of sick leave and holiday leave until March 8, 1994. On March 9, 1994, Eible began a period of sick leave without pay, but with benefits. ASH policy allows for six months leave without pay due to disability or illness, with a six month extension if the employee proves continuing disability or illness. In August, 1994, Eible filed a second complaint with the PHRC, alleging discrimination based on handicap.[1] ASH granted Eible a six month extension of leave in September, 1994.

Both DPW policy and the union contract which Eible was under limit sick leave without pay to a maximum of one

---

[1] The PHRC held a fact-finding conference on Eible's claim, but issued no determination.

year. The DPW personnel manual states that failure to return to work after a period of leave without pay is considered a voluntary resignation. Eible admits receiving letters from ASH, dated February 3 and February 13, 1995, notifying him of the resignation policy, and he also admits that on March 13 or 14, 1995, he received ASH's acceptance of his resignation.

ASH offered Eible an alternative position as a Food Service Worker I, a non-civil-service position, at the meeting with the PHRC in 1994, and again by letters dated February 17 and March 8, 1995.

II. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Unless evidence in the record would permit a jury to return a verdict for the non-moving party, there are no issues for trial, and summary judgment becomes appropriate. Anderson, 477 U.S. at 248. In considering a motion for summary judgment, a court does not resolve factual disputes or make credibility determinations and must view facts and inferences in the light most favorable to the party opposing the motion. Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1127 (3d Cir. 1995). The party opposing the summary judgment motion must come forward with sufficient facts to show that there is a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

A. Americans with Disabilities Act

The ADA prohibits discrimination against "qualified individual[s] with a disability because of the disability." 42 U.S.C. § 12112(a). There are three criteria to show a

violation: first, a disability, second, that the plaintiff is qualified, and third, that the termination was an unlawful discrimination based on the disability. Tyndall v. National Educ. Ctrs. Inc., 31 F.3d 209, 213 (4th Cir. 1994). Disability, in turn, is defined in three distinct ways: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102 (2). The EEOC regulations give some examples of major life activities: caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. 29 C.F.R. § 1630.2(I). "Substantially limits" means either the individual is unable to perform a major life activity, or, the individual is "significantly restricted as to the condition, manner or duration" under which he can perform the major life activity, when compared to the abilities of the average person in the general population. 29 C.F.R. § 1630.2(j)(1); see Kelly v. Drexel Univ., 94 F.3d 102 (3d Cir. 1996) (ruling plaintiff who walked slowly and used handrail when climbing stairs is not substantially limited in the major activity of walking). For the major life activity of working to be substantially limited, the plaintiff must be precluded from employment in a class of jobs, rather than just a particular job. 29 C.F.R. § 1630.2(j)(3)(I).

Eible claims that his inability to lift over twenty pounds unassisted was a substantial limitation on his working, and thus a disability. The courts seem in agreement that, with regard to working, lifting restrictions of twenty-five pounds or more are not substantial limitations. See Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346 (4th Cir. 1996) ("[W]e hold, as a matter of law, that a twenty-five pound lifting limitation—particularly when compared to an average person's abilities—does not constitute a significant restriction on one's ability to lift, work, or perform any other

major life activity."), cert. Denied, --- U.S. ----, 117 S.Ct. 1844, 137 L.Ed.2d 1048 (1997). Below this, there are not bright lines as to what sort of lifting restrictions constitute disabilities. See, e.g., Lowe v. Angelo's Italian Foods, Inc., 87 F.3d 1170 (10th Cir. 1996) (holding issue of fact exists as to disability of a woman with multiple sclerosis who could not lift more than 15 pounds, and should not often lift less than that, and who also faced limitations on her stooping and bending); Haysman v. Food Lion, Inc., 893 F.Supp. 1092 (S.D. Ga. 1995) (same, where plaintiff was limited to lifting 10-15 pounds, could only stand for 30 minutes, and walk for 3 minutes).

Even when viewed in the light most favorable to the plaintiff, the evidence on this point does not seem sufficient to withstand summary judgment. Eible claims that his injuries limited him from the whole class of jobs which require heavy lifting, yet he admits that he has held two cook positions since his position at ASH. See Howell v. Sam's Club, 959 F. Supp. 260, 266 n.10 (E.D. Pa. 1997) ("Even a medically documented, moderate lifting restriction is not sufficient to withstand summary judgment if the employee cannot demonstrate how the lifting restriction substantially limits his or her ability to engage in the major life activity of working.").

However, I need not here decide at what weight a lifting restriction changes from a general barrier to a specific disability, or whether Eible was regarded as having a disability.[2] Even assuming that Eible's inability to lift more

---

[2] Eible argues in the alternative that he is "disabled" because he is regarded by his employer as having a disability. See 42 U.S.C. § 12101(2)(C). Plaintiff has failed to present any evidence that either DPW or ASH perceived him as being substantially limited in his ability to work, beyond the simple lifting restriction. In fact, plaintiff does no dispute that defendants offered him other job opportunities at ASH. This demonstrates that defendants did not regard plaintiff as having an

than twenty pounds did constitute a disability, he has failed to advance any evidence on the other elements of an ADA claim, namely that he is a "qualified individual," or that ASH took action "because of his disability."

A "qualified individual with a disability" is one who meets the job-related requirements and "who, with or without reasonable accommodation, can perform the essential functions" of the job. 29 C.F.R. § 1630.2. Attendance at work has been held an essential function of almost any job. See, e.g., Tyndall, 31 F.3d at 213 (holding that to be a qualified individual under ADA, plaintiff must "be willing and able to demonstrate these [job] skills by coming to work on a regular basis.") While an employer is required to make a reasonable accommodation for a disabled individual, McCoy v. Pennsylvania Power & Light Co., 933 F. Supp. 438, 440 (M.D. Pa 1996), and granting leave is one such possible accommodation, an employer is not required to provide it indefinitely. See Myers v. Hose, 50 F. 3d 278, 283 (4th Cir. 1995) (employer does not have to "wait an indefinite period" for accommodation of extra leave time to enable employee to perform essential functions). "[R]easonable accommodation is by its terms most logically construed as that which presently, or in the immediate future, enables the employee to perform the essential functions of the job in question." Id.

Here, Eible had been on leave without pay for a year before the termination of his job with ASH, and he had been out of work for over fifty days in the four months immediately preceding that leave. He does not claim that he had been granted or even requested additional leave, and yet he did not return to work at the end of his leave period. Even though he admits receiving letters notifying him that a failure to return would be deemed an immediate resignation, and

---

impairment that substantially limited working, but, rather, that defendants regarded plaintiff as having a physical impairment that limited his ability to perform the functions of one particular job.

although he had responded to similar letters at the end of previous leave periods, he did not contact his employer in any way about his continued absence from work once his leave ended on March 8, 1995. Even granting Eible the benefit of the doubt that he did not understand the implications of his actions, it is still plain that he did not attempt to meet the simple job requirements of attendance. ASH is not required to wait indefinitely for Eible to decide to return to work, and Eible cannot be considered a "qualified individual" if he does not go to work. See Tyndall.

Nor is there any evidence that Eible was discharged "because of his disability." Even assuming that plaintiff was disabled, defendant has articulated a legitimate, non-discriminatory reason for the 'voluntary termination.' See McNemar v. Disney Store, Inc., 91 F.3d 610, 619 (3d Cir. 1996). The DPW personnel manual states that a failure to return to work after a leave shall be considered a resignation. Further, the ASH policy on leave, which Eible took advantage of from March 1994 to March 1995, also clearly states that a failure to return to work at the end of a leave will be considered a resignation. Eible has not come forward with any evidence that this reason was a pretext for a discriminatory action. Id. He has not alleged, yet alone offered proof, that other employees were treated differently in the same situation. Eible argues that the fact that ASH considered him to have resigned when "everyone knew" that he wished to return to the cook position shows an intent to "trick" him. However, Eible admits receiving letters warning him of the policy, and the termination sheet, which Eible also admits receiving, clearly states that the reason for the termination was a "failure to return to work." Eible does not contend that he did in fact return to work. Confusion on the part of the employee as to the policies of the employer does not show discriminatory intent.

Accordingly, defendants' motion for summary judgment on the ADA claim must be granted.

B. Age Discrimination

Plaintiff has also alleged age discrimination in ASH's termination of his job. Defendants argue that Eible cannot maintain his age discrimination claim because he did not satisfy the statutory filing requirements of 29 U.S.C. § 626(d), which requires prospective ADEA plaintiffs to file charges with the EEOC before bringing suit. 29 U.S.C. § 626(d). In a state with its own remedies for age discrimination, such as Pennsylvania, the charge must be filed with the EEOC within 300 days of the alleged discrimination. Id. The purpose of the filing requirements is to provide notice of the alleged violation to the EEOC and to afford the agency opportunity to resolve the dispute through conciliation. See Bihler v. Singer Co., 710 F.2d 96, 97 (3d Cir. 1983) ("Because primary responsibility for enforcement of the ADEA rests with the Equal Employment Opportunity Commission ("EEOC"), the ADEA requires that prospective plaintiffs provide the EEOC with an opportunity to resolve the dispute without recourse to litigation before proceeding on their own."). A plaintiff's failure to file a timely charge with the EEOC will result in the dismissal of the civil proceedings. See, e.g., id. at 98-99.

The regulations for filing an ADEA charge expressly state that "a charge is sufficient when the Commission receives from the person making the charge either a written statement or information reduced to writing by the Commission that conforms to the requirements of § 1626.6." 29 C.F.R. § 1626.8(b) (emphasis added). The EEOC filing period is statutory, not jurisdictional, and so it may be equitably tolled. See Perkins v. Silverstein, 939 F.2d 463, 470 (7th Cir. 1991); English v. Pabst Brewing Co., 828 F.2d 1047, 1049 (4th Cir. 1987). The filing period may be tolled

where the employer acts to deceive the employee as to his rights to file a claim. English, 828 F.2d at 1049.

This court previously dismissed the plaintiff's ADEA claim because he had not alleged facts in the complaint necessary to satisfy the jurisdictional prerequisites; however, this court also granted the plaintiff leave to file an amended complaint. Accordingly, plaintiff amended his complaint to state that he had fulfilled the jurisdictional requirements of the ADEA by filing a charge with the EEOC. In addition to the previously submitted "Charge of Discrimination," which bears neither a charge number nor a date, the plaintiff now submits affidavits to support his allegations. Specifically, he includes in his response affidavits from his counsel's notary and secretary who aver that they notarized and mailed the documents to the EEOC on June 8, 1996. Defendant argue, however, that merely mailing the amended charge to the EEOC does not constitute a valid "filing" under 29 U.S.C. § 626(d), and, in support of this argument, the defendants submit affidavits from the PHRC and the EEOC that, while they do have records of Eible's disability claim, they have no record of Eible's having made an age discrimination claim.

Under the 300-day statute of limitations, Eible had until January 2, 1996 to file an age discrimination claim with the EEOC. 29 U.S.C. § 626(d). Although clearly aware of the importance of filing a charge with the EEOC, plaintiff comes forward with no evidence that a charge of age discrimination was ever actually received by the EEOC.[3] Nor does plaintiff allege that defendants actively deceived him as to his right, or the need, to file a claim with the EEOC. I thus find no basis for tolling the filing period.[4] The defendant's

---

[3] Plaintiff introduces no evidence that, between the alleged June 8 filing and the expiration of the filing period on January 2, either Eible or his counsel even attempted to confirm that a charge had been filed.

[4] Further, even had the filing requirement been met, plaintiff has not provided evidence sufficient to establish a prima facie case of age

motion for summary judgment as to the ADEA claim must be granted.

C. First Amendment Violation

Eible also alleges that the individual defendants unconstitutionally abridged his right to free speech as protected by the First Amendment. He says that the defendants retaliated against him for advising them of his disability. The United States Supreme Court held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest," the employee's speech is not constitutionally protected. See Connick v. Meyers, 461 U.S. 138, 147-48 (1983); see also Holbrook v. City of Alpharetta, Georgia, 112 F.3d 1522, 1530 (11th Cir. 1997)(holding statement by employee alleging disability discrimination did not constitute protected speech under the First Amendment). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement as revealed by the whole record." Connick, 461 U.S. at 147-48. Defendants assert that Eible's statements concerned only a personal grievance because they did not refer to any practice or course of conduct by ASH against disabled persons. Instead, Eible sought redress only for his personal employment situation.

---

discrimination. The ADEA provides that "[i]t shall be unlawful for an employer...to discharge any individual...because of such individual's age." 29 U.S.C. § 623(a)(1). To establish a prima facie case under the ADEA, Eible must prove that (1) he was in the age group protected by the ADEA, (2) he was discharged, (3) at the time of his discharge or demotion, he was performing his job at a level that met his employer's legitimate expectations, and (4) his discharge occurred under circumstances that raise a reasonable inference of unlawful age discrimination. See Mitchell v. Data General Corp., 12 F.3d 1310, 1314-15 (4th Cir. 1993). As with the ADA claim, plaintiff has not come forward with any evidence of elements (3) and (4).

In his response, Eible now claims that the letters which he wrote to the state administrators were an attempt to expose the allegedly discriminatory policies of ASH and thus bore upon a matter of public concern. He argues that although he was pursuing action on his own behalf, his speech implicated employer policies of general concern. Eible points to defendants' statements about how they responded to the letters as evidence that he spoke on "matters of public concern," but he does not come forward with any evidence about the content of the letters. His bare assertion that he complained about defendants' refusal to provide the accommodation he desired does not create a genuine issue of material fact as to whether defendants violated the First Amendment. See Holbrook, 112 F.3d at 1530 (stating that although "a matter of concern to an individual employee may intersect, at times, with a matter of widespread public interest, a public employee may not transform a personal grievance into a matter of concern by invoking a supposed popular interest in the way public institutions are run"). I thus find that Eible has not stated a claim under § 1983 for violation of his First Amendment rights.

D. Deprivation of due process under 42 U.S.C. § 1983.

Finally, plaintiff appears to argue that failure to give him a hearing on, or a specific notice of the time period for appeals of, his termination constituted violation of his procedural due process rights under the U.S. Constitution. Respectfully, plaintiff's arguments confuse not having a hearing with not having the opportunity for one. It is undisputed that Eible had timely notice of the event-the acceptance of resignation-which severed his property right. There was no attempt by the defendants to hide the "resignation" from the plaintiff. Eible does not dispute that if he had filed a claim within 20 days of his actual termination, the Civil Service Commission would have granted him a

hearing. Thus, there was the opportunity for a hearing. When plaintiff was put on notice that his employer was considering an action adverse to his interests, he should have acted to protect what rights he had. That Eible did not recognize the importance of the acceptance of resignation letter does not violate his due process rights. Accordingly, as to the denial of due process claim, the motion for summary judgment will be granted.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL EIBLE,	:	
Plaintiff	:	Civil Action
	:	
v.	:	No. 96-4655
	:	
FEATHER O. HOUSTON, et al.,	:	
Defendants	:	

ORDER

AND NOW, this 24th day of July, 1998, Plaintiff's Motion for Reconsideration is DENIED.*

BY THE COURT:

_____

24a

---

* A federal district court will grant a motion for reconsideration based upon one of three reasons: "(1) an intervening change in controlling law, (2) the emergence of new evidence not previously available, or (3) the need to correct a clear error or law or to prevent a manifest injustice." Environ Products, Inc. v. Total Containment, Inc., 951 F. Supp. 57, 62 n.1 (E.D.Pa. 1997); see also, Harsco Corp. v. Zlotnicki, 779 F. 2d 906, 909 (3d Cir. 1985), cert. Denied, 476 U.S. 1171 (1986) ("The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence."). Plaintiff claims that the controlling law was changed by the Third Circuit's decision in Deane v. Pocono Medical Center, 142 F.3d 138 (3d Cir. 1998), and that this court made a clear error of law in its determination of his due process claim. In his motion for reconsideration, plaintiff does not raise any new arguments or evidence. In asking for reconsideration of his due process claim, plaintiff simply seeks to rehash the same arguments presented to the court before. In asking for reconsideration of his ADA claim, plaintiff cites Deane as effecting a change in controlling law. However, Deane does not change the law on which I based my previous decision. To reiterate my earlier ruling, regardless of whether Eible might have a disability or be regarded as having one under the ADA, he was not a "qualified individual" under the ADA, and so has no claim. Accordingly, the motion for reconsideration is denied.

254

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

MICHAEL A. EIBLE, Petitioner	:	No. 1867 C.D. 1995
	:	ARGUED: April 18, 96
v.	:	
STATE CIVIL SERVICE COMMISSION, Respondent	:	

BEFORE: HONORABLE JAMES GARDNER COLINS, President Judge
HONORABLE JAMES R. KELLEY, Judge
HONORABLE CHARLES A. LORD, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY SENIOR JUDGE LORD FILED: May 17, 1996

Michael Eible (Eible) appeals an order of the State Civil Service Commission (Commission) dismissing his appeal and request for a hearing as untimely filed.

Eible worked as a cook for the Commonwealth of Pennsylvania (Commonwealth) at Allentown State Hospital. He alleges he was out of work receiving workers' compensation beginning January 18, 1994. On or about March 13, 1995, he received a "notice of employee separation" from the Commonwealth, dated March 10, 1995, indicating he had refused work and had resigned on March 9. The notice contained a signature space marked "not available" and the date "3-10-95" under the statement "I

voluntary resign from my position with the Commonwealth..." A letter of the same date informed him that, pursuant to prior correspondence that failure to return to work would be deemed a resignation, "we have no choice but to accept your resignation..."

Eible avers here that he had no intent to resign and he thought it obvious that the notice of employee separation form was a clerical error or that the form did no more than to seek his signature if he were resigning; her therefore did not sign it. He also asserts that a union representative advised him not to sign since he did not want to resign. Eible states that he subsequently received two letters dated April 11, 1995 from the Commonwealth stating that he owed an overpayment of $1,276.10 from sick time and annual leave. According to Eible, this was the first time he realized that the Commonwealth considered him to have resigned. These letters are not in the record.

Eible filed an appeal with the Commission on April 29, 1995, seeking "to go back to work on Handicap Law of 92" and indicating March 14, 1995 as the date he was notified of the personnel action he was appealing.[1] In denying a hearing, the Commission held that Eible "was notified of the appointing authority's acceptance of his resignation by letter dated March 10, 1995. The appeal was postmarked to the Commission on April 29, 1995. These dates indicate that the appeal was filed beyond the 20-day time limit. 4 Pa. Code, Section 105.12 (a) (3)."

The sole issue in this case is whether Eible's request for hearing on his "resignation" was properly denied.

Eible argues that he should not have been denied a hearing because, clearly, no resignation is valid without a

---

[1] Eible also brought a disability discrimination claim based on an action taken on November 22, 1993.

signature. 71 P.S. §741.806;[2] 4 Pa. Code §101.51. He contends he never signed anything and he never intended to resign. He maintains that he filed his request within twenty days of the time he was notified, based on the April 11 letters, that the Commonwealth took the erroneous position he had resigned. He claims this case is controlled by Civil Service Commission v. Rogers, 544 A.2d 1115 (Pa. Cmwlth. 1988), which held that the appeal period does not begin to run with a notice of intent to dismiss, but only with an appealable notice of dismissal.

The Commission responds by emphasizing that Eible's appeal request form states he was notified on March 14, 1995 of the personnel action he was appealing. His appeal was not taken within twenty days of that date. Thus, the Commission asserts it was mandatory that it not consider the appeal. 71 P.S. §741.951; Department of Education v. Maskaly, 554 A.2d 146 (Pa. Cmwlth. 1989). The Commission states it is proper for it to rely on the date of notification indicated by an employee on his appeal request form. Balas v. Department of Public Welfare, 563 A.2d 219 (Pa. Cmwlth. 1989). Moreover, it reminds us that, under our limited scope of review, this Court will not consider facts not of record before the Commission. Avery v. Pennsylvania Labor Relations Board, 509 A.2d 888 (Pa. Cmwlth. 1986); Behm v. State Civil Service Commission, 494 A.2d 1166 (Pa. Cmwlth. 1985). The Commission accurately points out that the letters dated April 11 and an affidavit from Eible, all attached to Eible's brief, are not part of the record before the Commission and may not now be considered.[3]

---

[2] Section 806 of the Civil Service Act, Act of August 5, 1941, P.L. 752, as amended, 71 P.S. §§741.1 – 741.1005.

[3] The Commission also notes that Eible could have included the April 11 letters in his appeal request or petitioned for reconsideration. In any event, contrary to Eible's claim, we do not see how the April 11 letters,

We resolve this case as follows. There is no doubt that a signature and intent are required for a resignation under 71 P.S. §741.806 and 4 Pa. Code §101.51. However, it is also obvious that challenges must be made within a certain time period. In these cases the time for appealing is statutorily limited to twenty days following notice of the challenged action. 71 P.S. §741.951. Unlike in Rogers, there was a notice of separation here. The letter of March 10 recounted that Eible was told his failure to return to work on or before March 9 "would be deemed a resignation." Eible also received a "notice of employee separation" dated March 10, informing him that he was separated for refusal to work and that he was considered to have resigned. Together the letter and notice constitute ample proof that Eible knew or should have known that he was considered separated. Eible acknowledged the March notice when he appealed some forty-five days later. Thus, Eible should have acted timely, but did not. Based on the statutory appeals period and the precedent cited by the Commission mandating strict adherence to timeliness in asserting error by the appointing authority, we must reject this appeal.

Accordingly, the Commission's order is affirmed.

Charles A. Lord, Senior Judge

---

as opposed to the March 10 notification, showed that the Commonwealth considered Eible to have resigned.